being reduced to culpable homicide not amounting to murder or even to a conviction on a charge of voluntarily causing grievous hurt. He also mentioned that the defence was one of accident. He made this mention in one brief sentence. He went on to deal with this defence by reminding the assessors that all the accused had to do was to cast a reasonable doubt as to the truth of the prosecution case or as to her guilt, even though they did not believe the truth of her defence. If she succeeded in doing so, she would be entitled to be acquitted on the charge against her.

It might of course be argued that all in all, this summing-up satisfied the requirements that the defence be adequately put to the assessors, since they were told that the accused was entitled to an acquittal on the defence of accident if she was thought to have succeeded in establishing it on a balance of probabilities. Where the address is made to trained legal minds, it might be possible to accept such a submission but the assessors (and jury-men, for the matter) are all drawn from the general public and are untrained in law. Bearing this in mind, we cannot consider any summing-up as adequate which does not clearly, in simple language, and in words which they are capable of understanding, explain the issues fully to them. Where there is an area of misunderstanding, the summing-up cannot be regarded as satisfactory. That there is such an area in the present case is, with respect, clear, since immediately afterwards, the learned judge went on to say: —

"However, in such event, I shall be framing certain questions for you to consider at the end of this summing-up, as to whether, on the whole of the evidence including the defence and bearing in mind what I have just directed and reminded you as to the burden and standard of proof, you consider that the accused is guilty of the lesser offences of culpable homicide or of voluntarily causing grievous hurt."

Suffice it to say that on the questions framed for answer by the assessors, the verdict could only be guilty of murder, or of culpable homicide not amounting to murder or of voluntarily causing grievous hurt. There was no question whatsoever of acquittal on the defence of accident. There was not the slightest direction that accident, if accepted, must necessarily nullify any intention to cause death or bodily hurt.

It is a paramount principle of criminal law that a summing-up must fairly put the case for the defence before the jury: see, *inter alia*, *R.* v. *Immer*,[1] *R.* v. *Frampton*,[2] *R.* v. *Brookes*,[3] *R.* v. *Ong Choon*.[4] In *Mensah* v. *R.*,[5] the failure of the judge to take the opinion of the jury on the possibility of provocation reducing the charge of murder to one of culpable homicide not amounting to murder was held to justify the interference of the Privy Council on appeal, even though the point was raised for the first time in argument before it.

As the defence of accident was not dealt with adequately the possibility that the summing-up might have led the assessors to take a wrong view of the law could not be overlooked.

The case of *Ratnam* v. *R.*[6] is very much in point. The accused had stabbed his over-seer. He was charged with murder. During the trial, in answer to a question put by the judge, the appellant stated that he did not intentionally stab the deceased. His evidence was that the death was purely accidental. In his summing-up, the judge directed the jury that the whole case was whether the evidence by the defence was sufficient in their minds to reduce the charge from murder to culpable homicide not amounting to murder, on the grounds that the appellant was provoked, which was the suggestion by his counsel, or if they accepted his story, that he turned round with such force that the knife accidentally hit the deceased and that he had no intention of stabbing the deceased. The judge also directed the jury that the appellant must be guilty of either one of these two offences. The Court of Criminal Appeal quashed the conviction, holding that the judge had misdirected the jury in two aspects. First, if the jury had accepted the appellant's story that the fatal blow was unintentional and a pure accident, there would be no evidence to support a charge of culpable homicide not amounting to murder (and we would add, of voluntarily causing grievous hurt), as criminal intention had to be fully established as in murder. Secondly, the jury were not directed that if the offence of accident were accepted, the appellant was entitled to an acquittal. With respect, the same criticisms must be directed to the summing-up in this case.

In resisting the appeal, the learned Deputy Public Prosecutor attempted to argue that since suicide was a felonious offence, the accused's act of stabbing the deceased in the course of committing suicide, even if accidental, could not bring the offence within section 80 Penal Code. We do not think that section 80 Penal Code excludes the defence of accident from cases other than those in the circumstances therein mentioned. *Ratnam's case, supra,* is sufficient answer.

On a proper and reasonable reading of the summing-up, we cannot feel confident that if properly directed, the assessors would have necessarily returned the verdict they did return. For this reason, the appeal was allowed.

Appeal allowed.

Solicitors: *Tang & Co.*

SUNDANG TIMBER CO. SDN. BHD. v. KINABATANGAN DEVELOPMENT CO. SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Charles Ho JJ.) June 17, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 130 of 1976]

Contract — Illegality — Assignment of licence to extract timber — Agency agreement coupled with power of attorney — Forests Enactment, 1968, ss. 24(6) and 43(1).

Practice and Procedure — Effective law applicable — Date of contract, writ or trial.

Forests — Timber — Extraction — Contract — Forest Enactment, 1968, ss. 24(6) & 43(1).

Conservator — Conditions prescribed — Whether part of contract.

The appellants had been granted a special licence by the State Government of Sabah to extract timber. Subsequently

they entered into an irrevocable agency agreement with the respondents and also gave a power of attorney to the respondents irrevocable for a period of 10 years to operate and manage the appellant's business. The appellants claimed that the respondents were indebted to them and brought an action to recover the amount due on an alleged final statement of account. The respondents in their defence raised the issue of illegality. The learned trial judge ruled that the agreement read with the power of attorney was in breach of the provisions of the Forest Enactment, 1968, and was therefore illegal and any claim based thereon was unenforceable. The appellants appealed.

Held: the agreement in this case was clearly illegal being in breach of section 24(6) of the Forests Enactment. Consequently any claim based thereon cannot succeed as it would be tainted with illegality.

Cases referred to:-

(1) *Ebbw Vale Urban District Council* v. *South Wales Area Licensing Authority* [1951] 2 K.B. 366.

(2) *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.* [1971] 2 M.L.J. 161.

(3) *Tan Bing Hock* v. *Abu Samah* [1967] 2 M.L.J. 148.

(4) *Tan Bin Hock* v. *Abu Samah* [1968] 1 M.L.J. 221.

(5) *Allah Rakhi & Ors.* v. *Shah Mohamed* A.I.R. 1934 P.C. 77.

(6) *Leong Poh Chin* v. *Chin Thin Sin* [1959] M.L.J. 246.

FEDERAL COURT.

W.K. Loo for the appellants.

C.T. Wong for the respondents.

Lee Hun Hoe C.J. (Borneo): Both appellants/plaintiffs and respondents/defendants are private limited companies. They are associate companies. Appellants hold about 40% of the total issued share capital in respondent company. Datuk G.S. Sundang, the major shareholder of appellant company, also holds shares in respondent company. His shareholding is next to Helen Chung Foh, the managing director of respondent company. Appellants were granted a special licence by the State Government of Sabah on February 1, 1964 to extract timber in an area in Lamag, Sandakan extending over 33 square miles. The licence was deemed to come into force on January 1st, 1963 and expired on December 31, 1972. Certain conditions were attached to the licence. On January 23, 1963 the parties entered into an agreement prior to the issue of the licence. On March 26, 1964 they entered into what was purported to be an irrevocable agency agreement to replace the earlier agreement for the extraction and sale of timber under the licence. On the same day appellants gave respondents a power of attorney irrevocable for a period of 10 years to operate and manage appellants' business. All the working capital came from respondents.

By a writ of summons dated November 18, 1972 appellants claimed that respondents were indebted to them in the sum of $3,055,734.82 based on a statement of account supplied by respondents. In their defence dated January 12, 1973 respondents denied the claim stating that appellants kept a running account with them as they acted as appellants' attorney. At the date of the defence there was no balance due. In fact, they allege that appellants have certain liabilities towards them, namely, (a) income tax claimed by Government amounting to $2,200,000 and (b) drawings by Datuk Sundang on behalf of and for the account of appellants totalling $950,000. Details and exact amount have yet to be worked out. It is said that the statement of account is not a document suitable for a cause of action in respect of account stated. Paragraph 9 of the amended defence reads: —

"Alternatively, the defendants shall contend at the date of the hearing that the said account was rendered in consequence of an illegal transaction in that the plaintiffs had, under an Agreement entered between the parties hereto dated March 26, 1964 and a Power of Attorney, committed the breach of the term and condition of the Forest Licence known as C.F.O.S. 1/63 Forest Circle, Sandakan, Forest District, Lamag in assigning and/or essentially transferring the rights, privileges and liabilities of the said Forest Licence which was granted to the plaintiffs by the State Government of Sabah to the defendants (photostat copies of the said Agreement and Power of Attorney are annexed hereto and marked as 'A' and 'B')."

In their reply appellants say that the statement of account represents a final statement of account and not a running account. The income tax should have been paid by respondents on behalf of appellants but they failed to do so. Appellants denied drawing the sum of $950,000. Paragraph 10 of the amended reply is as follows: —

"As to the amended paragraph 9 thereof, the plaintiffs deny that the said account was rendered in consequence of an illegal transaction as alleged and the plaintiffs say that neither the Agreement nor the Power of Attorney referred to constitute any assignment or transfer of the rights privileges and liabilities of Forest Licence C.F.O.S. 1/63 Forest Circle, Sandakan, Forest District, Lamag, as alleged."

The issue of illegality was thus raised. Counsel for both parties agreed to take this issue as a preliminary point under Order 25 rule 2 of the Rules of the Supreme Court. Consequently, the learned judge ruled that the agreement read with the power of attorney was in breach of the provisions of the Forests Enactment, 1968 and was, therefore, illegal and any claim based thereon was unenforceable. He further held that appellants could not assert a cause of action on account stated without reference to the illegal contract. Appellants appealed on several grounds but mainly complaining that the learned judge was wrong on question of illegality.

If I understand Encik Loo for appellants correctly, he had abandoned the contention that the special licence was not a licence within the meaning of section 24(b) of the Enactment. To his contention that the two documents were not sham documents and *ex facie* illegal. Encik Wong for respondents made clear that he did not dispute the contention but argued that the arrangements made by the parties under the two documents demonstrated the illegality. That the arrangements were made between two legal entities is not in dispute. Appellants contend that neither the agreement nor the power of attorney constitute any assignment or transfer of rights, privileges and liabilities of the licence. Appellants pointed out that the agreement was stated to be an agency agreement and to all intent it was such an agreement. Respondents made the point that although the agreement was purported to be an agency agreement, in actual fact it was not so. *Ebbw Vale Urban District Council* v. *South Wales Traffic Area Licensing Authority*[1] was cited in support. Appellants pointed out that in *Ebbw Vale Urban District Council's case*[1] there was no evidence that the commission had in fact appointed the company to act as their agent. In the absence of an

agency contract between the two companies one cannot be said to be the agent of the other. An agreement may be such an agreement. This is of course a matter for the court to construe.

The special licence was issued under Rule 3(2) of the Forest Rules 1954. When the agreement and the power of attorney were made the Forests Ordinance (Cap. 169) was then in force but was repealed and replaced by the Forests Enactment, 1968 which came into force on January 1, 1969. In repealing the Ordinance section 43(1) of the Enactment provides: —

"43.(1) The Forests Ordinance is hereby repealed:
Provided that —

(a) all appointments made, and powers and authorities exercised or conferred under that Ordinance shall, so far as they are not inconsistent with the provisions of this Enactment, be deemed to have been made, exercised or conferred under this Enactment;

(b) notwithstanding anything in this Enactment contained, any grant, licence agreement or contract —

(i) entered into prior to the first day of January, 1955, and expressed to confer any rights or privileges in respect of the utilisation of any land for the purposes of forestry or silviculture or in respect of the collection, removal, sale, purchase, utilisation or storage of forest produce; or

(ii) made under paragraph (a) of subsection (1) of section 6 of the said Ordinance, and still in force at the date of commencement of this Enactment, shall be deemed to be a licensed agreement for the purposes of this Enactment;

(c) any permit, licence or other right not falling under paragraph (b) of this proviso, issued or granted under the said Ordinance and still valid at the date of commencement of this Enactment shall be deemed to be a licence issued under section 24 of this Enactment.

(2) Where in any written law or document reference is made to a reserved forest such reference shall be construed as being to a Forest Reserve, and any land declared to be a reserved forest under the Ordinance hereby repealed shall be deemed to be a Forest Reserve duly constituted under the provisions of this Enactment which shall apply to such land accordingly."

The result is that a licence issued or granted under the Ordinance and still valid at the date of the commencement of the Enactment shall be deemed to be licence issued under section 24 of the Enactment.

The special licence is different from an ordinary licence in that in the case of a special licence prior approval of the minister is necessary and also the period may extend to 10 years. An ordinary licence in Form I is for a period not exceeding one year and renewal for a similar period not exceeding one year and renewal for a similar period on each occasion. For all purposes the provisions of the Forest Rules are deemed to apply to a special licence as if it were a licence in Form I. See Rule 3(3) of the Forest Rules, 1954. This has a far reaching effect.

Two conditions attached to the special licence need only be referred to. Under clause 2(6) "Forests Rules" means the Forests Rules, 1954 or any Rules from time to time replacing the same. Clause 17 provides: —

"The licensee shall not assign the benefits of this licence or assign, transfer, charge or part with any right or privilege thereunder without the previous sanction in writing of the Government under the hand of the Permanent Secretary to the Minister first had and obtained."

Section 24(6) of the Enactment reads: —

"A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law."

The learned judge was right to rely on *Lo Su Tsoon Timber Depot* v. *Southern Estate Sdn. Bhd.*[2] which followed *Tan Bing Hock* v. *Abu Samah*[3] and a later case[4] between the same parties.

The facts in *Lo Su Tsoon's case*[2] may be stated shortly. On September 14, 1965 Beaufort Timber Extraction Co-operative Society was granted a licence to extract timber at Lumadan, Sabah. By a power of attorney the society appointed Jesselton Development Limited their attorney in 1965 in respect of rights under the licence. In their turn the Jesselton Development Limited executed a deed dated September 13, 1966 appointing respondents in their place as attorneys for the licensees. Respondents exercised their rights under the licence until 1968 when they failed to pay royalty and other dues to the Forest Department resulting in the seizure of their logs. So, on December 12, 1968 respondents entered into an agreement with appellants whereby respondents transferred their rights in the licence to appellants. On appeal to this court the question of illegality was raised for the first time. In his judgment, Ismail Khan, then C.J. (Borneo) dealt, with respect, admirably with the relevant provisions of the Sabah forest legislation and came to the conclusion at page 164 that: —

"The agreement is, therefore, clearly in breach of the provisions of sections 23(a), 24(1) and (6) of the Enactment, and is illegal, and any claim based thereon will not be enforced."

Touching on the licence and the law applicable he made these observations on page 164: —

"The licence A.1(1) in Form 1 is subject to a condition that it is not transferable. Rule 4(1) itself of the Forest Rules 1954 provides that a licence such as Form 1 is not to be transferred. As the form did not contain this prohibition the conservator had inserted in the licence the condition against transfer pursuant to the said rule. There is nothing in the Forest Ordinance 26/1954 or in the Rules thereunder authorising the conservator to approve of any transfer. The Forest Ordinance, 1954 was repealed by the Forest Enactment 1968 which came into force on 1st January, 1969.

The respondents commenced their action on 14th July, 1969. The law applicable is therefore the Forest Enactment 1968. The Privy Council case of *Allah Rakhi & Ors.* v. *Shah Mohamed*[5] laid down as a general principle that the law must be considered as at the date when the writ was issued."

The same attack was made in the present case as in *Lo Su Tsoon's case.*[2] As Ismail Khan C.J. pointed out clearly at page 165 that: —

"What was attacked was the assignment in breach of the Forest Enactment 1968 of the rights under the licence to the appellants by the respondents as agents for the licensees under the agreement."

Just as the financial arrangements for the payment to the licensees is fatal in *Lo Su Tsoon's case,*[2] so also is such financial arrangement between appellants and respondents fatal to appellants' claim as it is a part of the consideration for the assignment to respondents of their rights under the special licence. One of the main reasons for the arrangements under the cover of the two documents is to ensure that respondents have complete control of the business aspects of the two companies and that they would be able to recoup

their investments plus substantial profits for both parties. Another reason is to deceive others into believing that respondents were agents when in actual fact all rights have been assigned to them. In other words respondents had stepped into appellants' shoes by acquiring all the rights under the special licence for all purposes.

Tan Bing Hock v. *Abu Samah*[3] and a later case[4] between the same parties and *Leong Poh Chin* v. *Chin Thin Sin*[6] cited by the parties were dealt with in sufficient detail in *Lo Su Tsoon's case.*[2] All I need say is that respondents in the present case are placed in the same situation as defendants in *Tan Bing Hock's case*[3] in that like defendants in that case respondents did not seek to enforce the illegal contract but were dragged into court and were entitled to set up the defence of illegality. It is true that in *Tan Bing Hock's case*[3] the licence prohibits in specific terms any transfer by power of attorney without the approval in writing of the District Forest Officer. While clause 17 does not say so in specific terms it also prohibits the licensee to assign, transfer, charge or part with the right or privilege under the licence without first obtaining the sanction in writing of the Government under the hand of the Permanent Secretary to the Minister. It is to be noted that the special licence was also signed by the Permanent Secretary. The special licence was meant for the licensees personally. No such sanction had been obtained. The arrangements were made by the parties because sanction would most likely be refused.

In the case under appeal the agreement and the power of attorney must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to appellants. In my view the agreement is clearly illegal, being in breach of section 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality. The power of attorney is necessary if respondents were to deal with others in such timber business, particularly with the Forest Department. As Ismail Khan C.J. remarked in *Lo Su Tsoon's case*[2] the power of attorney was merely "a colourable device to deceive others, particularly the Forest Department into believing that appellants (in our case respondents) were operating as agents for the licensees."

Assuming that the Forests Enactment, 1968 is not applicable, it is my view that appellants would also fail in their claim. This would involve the construction of the pre-1968 Forest Legislation. The Forests Rules, 1954 was made under section 42 of the Forests Ordinance (Cap. 169). The relevant provisions of Rule 3 may be set out: —

"3.(1) Except as otherwise provided in section 43 of the Ordinance, no person shall —

(a) fell, cut, ring, lop, tap, or injure by fire or otherwise any tree on Crown land;

(b) burn to charcoal any timber on Crown land; or

(c) cut, collect, or remove on or from Crown land any forest produce included in the royalty list prescribed in accordance with rule 19, or palm wood, rotan or mangrove bark;

except under and in accordance with these rules and the conditions of a licence in form I or forms IIA or IIB, issued by a forest officer or a special licence issued by the Conservator under paragraph (2), or of a sale under paragraph (3).

(2) Subject to subsection (2) of section 40, with the previous approval of the Minister, the Conservator may issue a special licence granting in such form and on such conditions as he may in each case impose, and for a period exceeding one year but not exceeding ten years, the sole right to cut or collect and remove all or any specified forest produce on or from any area of Crown land specified therein:

Provided that —

the royalty rates payable under any such special licence shall not be less than those prescribed in accordance with rule 19, unless specially approved by the Financial Secretary.

(3) With the previous approval of the Minister the Conservator may cause to be sold by public auction or tender the right to cut or collect and remove any specified forest produce on or from any particular area of Crown land for a period not exceeding two years subject to such conditions as he may in each case impose:

Provided that —

(a) the total revenue resulting from any sale shall not be less than the estimated current royalty of the produce growing on the area;

(b) that the area over which the right to take forest produce is to be sold to any one person shall not exceed 100 square miles.

The provisions of these rules shall, except in so far as they may be inconsistent with the terms of any licence issued or sale made under paragraphs (2) and (3), be deemed to apply to such licence or sale as if such agreement or sale were a licence in Form I.

(4) Any person who contravenes any of the provisions of sub-rule (1) of this rule shall be guilty of an offence and liable to imprisonment for a period of six months and a fine of one thousand dollars."

Section 20 of the Ordinance defines the offences, breach of which would render a person liable to penalty unless authorised under a licence, permit, grant, licence agreement or contract. Under section 20 of the Ordinance the conservator or any person authorised by him may issue licences or permits for all or any of the acts prohibited by section 20 upon such conditions and subject to the payment of such fees or royalty as may be prescribed or set out in such licence or permit. The proviso to Rule 3(3) of the Forests Rules, 1954 lays down quite clearly that the provisions of the Rules shall be deemed to apply to a special licence as if it were a licence in Form I. In which case Rule 4(1) applies for it provides: —

"4(1) Licences in Form I may be issued and thereafter renewed for any period not exceeding one year. They shall not be transferable and shall be subject to such conditions in addition to those provided for by the Ordinance and Rules, as the Conservator may cause to be endorsed thereon."

Section 41 of the Ordinance empowers the Conservator in issuing a licence to impose conditions. Clause 17 is one of such conditions to prevent assignment or transfer. The assignment of the rights under the special licence to appellants clearly contravenes Rule 3(1) for no person could fell, cut and so forth any tree on crown land except under and in accordance with the rules and the conditions of a special licence issued by the Conservator under paragraph 2. Fur-

ther, no proper sanction was obtained from the Minister for the assignment or transfer. Breach of any express condition of the special licence would result in the contravention of Rule 3(1) and (2). Further, appellants and respondents also contravene section 20 of the Ordinance. The agreement between the parties is clearly illegal even without resorting to the Forests Enactment, 1968.

In view of the conclusion that the agreement is illegal, being in breach of the Forest Legislation it is not necessary to touch on the other grounds which are concerned with account stated except to say that they have no merits.

For reasons given, I would dismiss the appeal with costs here and the court below. Deposit to respondents against taxed costs.

Chang Min Tat J. and **Charles Ho J.** concurred.

Appeal dismissed.

Solicitors: *W.K. Loo & Co.; Yong & Wong.*

KHOO THAU SUI v. UNITED ENGINEERS (MALAYSIA) SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Charles Ho JJ.) June 17, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 131 of 1976]

Hire Purchase — Second-hand tractor — Warranty — Failure to pay instalments — Termination of hiring — Propriety of re-possession — Costs of re-possession and storage — Hire Purchase Act, 1967, s. 15(1).

The appellant had originally entered into a hire purchase agreement relating to a new tractor with a finance company. Subsequently after ten instalments had been paid the agreement was terminated and the appellant then entered into a hire purchase agreement with the respondents relating to the tractor, which was then treated as a second-hand vehicle. The appellant fell into arrears with the instalment and subsequently the respondents terminated the agreement and repossessed the vehicle. The respondents then claimed the instalments outstanding and the costs of repossession and storage and after deducting the value of the tractor, they claimed the balance of $25,036. The appellant claimed that as the vehicle was not trouble-free, he was not liable to pay the instalments. Judgment was given in favour of the respondents and the appellants appealed.

Held: (1) the contention that the appellant was not obliged to pay the hire purchase instalments during the period that the vehicle was being repaired for damages sustained in a fire and consequently the respondents had no right to terminate the agreement was without substance or relevance;

(2) the respondents had complied with the provisions of the Hire Purchase Act 1967 before exercising their right to take possession;

(3) as the appellants had contractually undertaken to pay the costs and expenses of repossession and storage, they could not dispute their obligation to pay the actual costs;

(4) there was no breach of warranty by the respondents in this case as the damage to the vehicle did not come from defective parts or workmanship as in the warranty but was caused by heavy usage and by the fire which it caught.

Cases referred to:-

(1) *Bridge* v. *Campbell Discount Co. Ltd.* [1962] 1 All E.R. 385.

(2) *United Engineers Malaysia Ltd.* v. *Lai Ping Youn* [1968] 1 M.L.J. 189.

FEDERAL COURT.

W.K. Loo for the appellants.

Abdul Razak bin Rouse for the respondents.

Chang Min Tat J. (read by Lee Hun Hoe C.J. (Borneo)): The subject matter of this appeal was an "International" Model BTD 20 (201 Series) Diesel Crawler Tractor, hired out by the respondent to the appellant under a H.P. Agreement made between them on August 5, 1968 (the 1968 Agreement).

It would appear at least arguable whether the machine in question was a vehicle under the relevant Road Traffic Ordinance so as to bring the hiring within the provisions of the Hire Purchase Act, 1967. No thought by either side was given to this consideration. The case proceeded in the High Court on the assumption that the Hire Purchase Act, 1967 applied. It would perhaps be better if the appeal proceeded on the same assumption.

The price of the tractor treated by the respondent as a second-hand vehicle was agreed at $40,224. The cost of the hire was fixed at $5,028 in 8 instalments, the first instalment being paid on the execution of the agreement and the remaining seven payable at monthly intervals. If all the instalments had been paid, the tractor would then become the property of the hirer. But until final and full payment, it remained the property of the hiror, who would be entitled to terminate the hiring and take repossession if any instalment was not paid. In the event, not one of the remaining instalments was paid. The respondent (U.E.) as hiror terminated the hiring by notice on April 3, 1969 and received the vehicle on May 12, 1969. U.E. then claimed the full 7 instalments in the total sum of $35,196 to which it added the costs of repossession and storage in the sum of $9,840. It however allowed a deduction of $20,000 being the value of the tractor. This value was first set at an estimate of $23,000 but it was amended later to $20,000. The total sum claimed was $25,036.

The defence that was delivered made certain allegations of fact, apart from raising defences at law. It disclosed what I believe was the common practice of hire purchase of motor vehicles. U.E. was the importer and seller of the vehicle. It did not normally provide hire-purchase facilities. An intending purchaser without the means to buy the vehicle outright would be introduced to a finance firm, in this case the Malaysian Australian Finance Co. Ltd. (MAF), who would then pay U.E. the price for the vehicle, thereby becoming the owner of it and let it out on hire-purchase terms to the buyer. If it happened that the hirer defaulted in any payment, M.A.F. would terminate the agreement, repossess the vehicle, almost invariably through the agency of U.E. and then sell the vehicle to U.E., who I believe was contractually bound to buy it back. See *Bridge* v. *Campbell Discount Co. Ltd.*[1] for a better description of this arrangement.

This was the arrangement which the appellant alleged in his defence. His H.P. Agreement with M.A.F. was made on April 23, 1966 (the 1966 Agreement). The vehicle was a new one and was priced